3-13-2014

Padilla v. State Appellant's Brief Dckt. 41772

IN THE SUPREME COURT OF THE STATE OF IDAHO

TARANGO PADILLA Petitioner-Appellant, vs. STATE OF IDAHO, Respondent.	)	Consolidated S.Ct. Nos. 41772/41773 D.Ct. Nos. CV-2013-1782/1783 (Twin Falls County)

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fifth
Judicial District of the State of Idaho
In and For the County of Twin Falls

HONORABLE RANDY J. STOKER
Presiding Judge

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A. Nature of the Case

This is a consolidated appeal from the district court's denial of Appellant Tarango Padilla's petition for post-conviction relief. R 177-178, 301-303.[1] Mr. Padilla was convicted following a jury trial in two consolidated cases of two counts of theft of a financial transaction card and found guilty of a persistent violator enhancement. R 156-157, 288-289. In his petition, Mr. Padilla raised the claim of ineffective assistance of trial counsel in failing to file a motion to suppress based upon an illegal *Terry*[2] stop. R 54, 225. The district court denied this claim stating, "Even assuming that there was no basis for a *Terry* stop/frisk as Padilla suggests, police would have had the right to search him following his arrest on the warrant." R 162, 294. Relief should be granted because the police executed the *Terry* stop without reasonable and articulable suspicion that Mr. Padilla had or was about to commit a crime and because the police did not know of the outstanding warrant until they had taken Mr. Padilla to the jail for booking. The judicial determination of the constitutional validity of a stop/arrest/search focuses on the information and facts the officers possessed at the time and subsequent discovery of a warrant will not cure prior unconstitutional conduct. *State v. Maland,* 140 Idaho 817, 823, 103 P.3d 430, 436 (2004). A motion to suppress in this case would have resulted in the suppression of all the state's evidence linking Mr. Padilla to the financial card thefts. Trial counsel was ineffective in

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[1] Mr. Padilla's cases were consolidated for trial and appeal and then later consolidated for post-conviction and this appeal. All the pleadings appear twice in the Clerk's Record in identical form in this case. References will be given for both locations in the record; however, the duplicate pleadings and court orders will be referred to in the singular.

[2] *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868 (1968).

failing to file such a motion, *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984), and therefore post-conviction relief should have been granted.

B. Procedural History and Statement of Facts

Per the affidavit of Officer Matthew Gonzales, Mr. Padilla's case began in this way:

> On 08/07/2009, at approximately 0232 hours, I was traveling eastbound in the alley between 5th Avenue East and 6th Avenue East in the 400 block. As I was driving I noticed a male walking southbound on Ketchum Street. When the male noticed my marked police vehicle he started running. I got out of my vehicle and yelled for the male to stop running. The male continued running and was jumping fences during this time I was yelling for him to stop running. The male, identified as Tarango Deforest Padilla, was later caught laying in some bushes at the intersection of 5th Avenue East and Blue Lakes Boulevard, in the City and County of Twin Falls, State of Idaho. Padilla was detained until it could be determined why he had run. In a search of the area where the male was lying, I located two financial transaction cards and $458.00 dollars. Also laying in the area were some small ceramic pieces of a spark plug, which through my training and experience as a police officer I identified as a tool used to easily break vehicle windows. More ceramic pieces of the spark plug were located in Padilla's jacket pocket. I know these items are often used to burglarize vehicles. All of the items that were located in the bushes were clean and appeared to have just been placed there. A search of Padilla's person produced 15 peach colored pills with Watson 3203 stamped on it. These pills were identified using the Drug Bible as Hydrocodone Biturate, which is a schedule III controlled substance. The pills were not in a prescription bottle and Padilla did not have a prescription for the pills. Two other financial transaction cards were also located on Padilla's person. A small red flashlight was located in one of the yards that I chased Padilla through.
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> Padilla was placed under arrest for possession of a financial transaction card, possession of a controlled substance and possession of burglary tools and transported to the Twin Falls County Jail. At the jail I was informed that Padilla had a warrant out of Twin Falls County. I informed Padilla that he was also going to be booked on the warrant. Padilla stated that was the reason that he ran in the first place. After advising Padilla of his Miranda Warnings I asked Padilla how many cars he had gotten into and he stated that he had not broken into any cars. I asked him how he came to be in possession of financial transaction cards that were not his and he stated that he had found them on the ground. Padilla was booked in for possession of financial transaction cards, controlled substance, and burglary tools and the warrant.

State's Ex. 1, D 27, Ex. Disc, pp. 71-72. [3]

At trial, Officer Gonzales testified that Officer Schlund, who had arrived to assist him in chasing Mr. Padilla, reached Mr. Padilla first and "detained" him "with handcuffs." At that point, the police did a quick pat down for weapons. And, then, Officer Schlund directed Officer Gonzales to the place were Mr. Padilla had been captured. In that place, Officer Gonzales found ceramic pieces from a spark plug, some financial transaction cards, and some money. Officer Gonzales then searched Mr. Padilla and found more pieces of spark plug, two more financial transaction cards, and some pills. The cards found on Mr. Padilla bore the name Jamie Labrum. Cards found on the ground bore the names of Savannah Davis and Thomas Mauch. State's Ex. 15, Ex. Disc pp. 205-206.

The state charged Mr. Padilla in two separate cases with theft for possession of a financial transaction card (Jamie Labrum's card and Thomas Mauch's card). State's Ex. 3 and 4, Ex. Disc, pp. 83-90. The state later added a persistent violator enhancement. State's Ex. 7 and 8, Ex. Disc, pp. 119-127.

Defense counsel did not file a motion to suppress all the evidence obtained pursuant to the unconstitutional *Terry* stop, the subsequent unconstitutional search, and unconstitutional arrest following the unconstitutional search. R 47-48, 225-226. The state tried the consolidated cases before a jury. Mr. Padilla was convicted and sentenced to two concurrent terms of 15 years

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[3] Officer Gonzales' testimony at the preliminary hearing was consistent with his affidavit. In that testimony, he stated that he was in his police car in an alley with his lights off when he saw Mr. Padilla. He watched Mr. Padilla enter the alley, turned on his lights, drove toward Mr. Padilla, and Mr. Padilla turned and looked and then left the alley and started to run. Officer Gonzales followed Mr. Padilla with his car, then got out of the car, ordered Mr. Padilla to stop and then chased him on foot. State's Ex. 5, Ex. Disc pp. 94-97.

(7 years fixed followed by 8 indeterminate). State's Ex. 11 and 12, Ex. Disc, pp. 167-176. The district court later denied Mr. Padilla's Criminal Rule 35 motion for reduction of sentence. State's Ex. 17-19, Ex. Disc, pp. 377-391.

Mr. Padilla appealed and the Court of Appeals denied relief in an unpublished opinion. *State v. Padilla,* S.Ct. Nos. 38899/38900, filed December 28, 2012. State's Ex. 22, Ex. Disc, pp. 428-433.

Mr. Padilla filed a timely petition for post-conviction relief alleging ineffective assistance of counsel, including ineffective assistance in failing to file a motion to suppress. R 13-21, 191-199. Appointed counsel filed an amended petition which also raised the claim of ineffective assistance in failing to file a motion to suppress. R 53-58, 232-237. Mr. Padilla alleged that trial counsel was ineffective in failing to challenge the illegal *Terry* stop. R 54-55, 233-234.

Although the state filed a motion for summary dismissal, it failed to notice its motion for a hearing and the court held an evidentiary hearing. R 70-91, 252-274. In its brief in support of its motion, the state did not address the question of whether trial counsel was ineffective in failing to file a motion to suppress evidence seized as a result of an unconstitutional *Terry* stop, but rather argued that counsel was not ineffective in failing to file a motion to suppress statements made both before and after *Miranda*[4] warnings were given because Mr. Padilla had not presented admissible evidence that his statements were the result of police coercion. R 81-85, 264-268.

At the evidentiary hearing, Mr. Padilla conceded that no harmful statements were obtained from him prior to the officer giving the required *Miranda* warning. However, he did

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[4] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602 (1966).

continue asserting that counsel should have filed a motion to suppress based upon an unconstitutional *Terry* stop. EH Tr. p. 16, ln. 6-9.

Mr. Padilla testified that when he was walking that morning, a vehicle with its headlights off drove toward him at a rate of speed that startled him. Fearing that he was going to be jumped, he ran. EH Tr. p. 38, ln. 19-p. 41, ln. 5. Mr. Padilla testified that he believed the stop and the subsequent search violated his constitutional rights. EH Tr. p. 42, ln. 13-p. 43, ln. 17.

The district court denied relief. R 156-166, 288-298. With regard to the claim of ineffective assistance of counsel in failing to file a motion to suppress, the court wrote: "Even assuming that there was no basis for a *Terry* stop/frisk as Padilla suggests, police would have had the right to search him following his arrest on the warrant. This doctrine coupled with the inevitable discovery doctrine would have resulted in denial of any suppression motion." R 162, 294.

The district court entered a final judgment. R 154-155, 299-300. This appeal timely follows. R 167-169, 301-303.

III. ISSUE PRESENTED ON APPEAL

Did the district court err in denying post-conviction relief given that Mr. Padilla's trial counsel was ineffective in not filing a motion to suppress evidence obtained in violation of the state and federal constitutions? Idaho Const. Art. I, §§ 13 and 17; U.S. Const. Amends. 4, 6, 14.

IV. ARGUMENT

Post-Conviction Relief Should Have Been Granted Because Counsel Was Ineffective in Failing to File a Motion to Suppress

Mr. Padilla did not have constitutionally effective assistance of counsel. Therefore this

Court should reverse the order denying post-conviction relief and remand with instructions to grant the petition.

Both the Idaho and the United States Constitutions guarantee criminal defendants the right to effective assistance of counsel. Idaho Const. Art. I, § 13; U.S. Const. Amends. 6 and 14. Denial of that right is a basis for post-conviction relief. I.C. § 19-4901(a)(1). Ineffective assistance is established when the petitioner shows that the attorney's performance was deficient and the petitioner was prejudiced by the deficiency. *Strickland v. Washington,* 466 U.S. at 687-88, 104 S.Ct. at 2064. A deficiency exists when the attorney's representation falls below an objective standard of reasonableness. *Id.*; *Aragon v. State,* 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Prejudice exists when there is a reasonable probability that, but for the attorney's deficient performance, the outcome of the proceeding would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068; *Aragon,* 114 Idaho at 761, 760 P.2d at 1177.

The standard of review applicable to this case is set out in *Rossignol v. State*:

> In order to prevail in a post-conviction proceeding, the applicant must prove the allegations by a preponderance of the evidence. I.C. § 19-4907; *Stuart v. State,* 118 Idaho 865, 869, 801 P.2d 1216, 1220 (1990). When reviewing a decision denying post-conviction relief after an evidentiary hearing, an appellate court will not disturb the lower court's factual findings unless they are clearly erroneous. I.R.C.P. 52(a); *Russell v. State,* 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). The credibility of the witnesses, the weight to be given to their testimony, and the inferences to be drawn from the evidence are all matters solely within the province of the district court. *Larkin v. State,* 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). We exercise free review of the district court's application of the relevant law to the facts. *Nellsch v. State,* 122 Idaho 426, 434, 835 P.2d 661, 669 (Ct. App. 1992).

152 Idaho 700, 702-3, 274 P.3d 1, 3-4 (Ct. App. 2012).

The district court erred in denying post-conviction relief because Mr. Padilla did establish

both deficient performance and prejudice.

As established by Officer Gonzales' police report and his testimony at the preliminary hearing, Mr. Padilla was subject to an unconstitutional stop. When Officer Gonzales first saw Mr. Padilla all he knew was that Mr. Padilla was walking at night in Twin Falls. Mr. Padilla entered the alley way where Officer Gonzales was parked with the car lights off. Officer Gonzales turned on the lights and began driving toward Mr. Padilla and Mr. Padilla ran.

Per *Terry,* an officer may conduct a brief, investigatory stop when the officer has reasonable, articulable suspicion that criminal activity is afoot. 392 U.S. at 30, 88 S.Ct. at 1868. While reasonable suspicion is a less demanding standard than probable cause, it still requires at least a minimal level of objective justification for making a stop. *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581 (1989). More than "an inchoate and unparticularized suspicion or 'hunch'" of criminal activity is required. *Terry, supra,* at 27, 88 S.Ct. at 1868.

While flight is a factor to consider in assessing whether reasonable suspicion exists, flight is not *per se* determinative of reasonable suspicion to support a *Terry* stop. As set out in Justice Stevens' concurrence and dissent in *Illinois v. Wardlow,* 528 U.S. 119, 126-7, 120 S.Ct. 673, 677 (2000), the Supreme Court rejects the proposition that flight is necessarily indicative of ongoing criminal activity, but rather, reasonable and articulable suspicion depends upon a consideration of the totality of the circumstances. As stated by the *Wardlow* majority, "Thus, the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." 528 U.S. at 125, 120 S.Ct. at 676.

In this case, the only factor Officer Gonzales had to support a *Terry* stop was Mr. Padilla's presence and his subsequent flight. This is not enough to justify a stop as illustrated by the

following cases decided after *Illinois v. Wardlow. supra*: *State v. Nicholson,* 188 S.W.3d 649 (Tenn. 2006) (defendant's proximity to an area being investigated for gang activity; defendant's refusal to hold up when told to do so; and defendant's rapid flight from the police not sufficient to give reasonable suspicion for a *Terry* stop); *People v. Harris,* 957 N.E.2d 930 (Ill. App. 2011) (flight without proof that the flight took place in a high crime area, in the absence of any evidence that police were responding to any report of a crime or investigating a crime insufficient to justify a *Terry* stop); *State v. Edwards,* 262 P.3d 358 (Kan. App. 2011) (attempt to elude a police officer, even at 1:00 a.m., does not provide reasonable suspicion for a *Terry* stop because attempting to elude in the absence of illegal activity is not a crime); *United States v. Neff,* 681 F.3d 1134 (10th Cir. 2012) (while unprovoked flight upon noticing the police may be a relevant factor in determining reasonable suspicion for a *Terry* stop, the factor, per *Wardlow,* must be taken in context, including whether it occurred in an area of heavy narcotics trafficking and occurred after seeing a caravan of police - flight alone is not determinative); *Commonwealth v. Washington,* 51 A.3d 895 (Pa. Super. Ct. 2012) (defendant's unprovoked flight in high crime area, without more, was insufficient to establish reasonable suspicion justifying a *Terry* stop, absent evidence that defendant knew he was running from police or that he ran in response to the police); *United States v. Navedo,* 694 F.3d 463 (3rd Cir. 2012) (unprovoked flight without more does not establish cause for arrest - a person whom the police approach is free to avoid the encounter by leaving and the rate of acceleration in the leaving is far too ephemeral a gauge to support a finding of probable cause).

Also informative is this summary of the law:

A majority of jurisdictions addressing the issue hold that flight alone is insufficient

> to justify a *Terry* stop. See, e.g., *Dimascio v. Municipality of Anchorage,* 813 P.2d 696 (Alaska App. 1991); *State v. Talbot,* 792 P.2d 489 (Utah App. 1990). (collecting cases); *People v. Shabaz,* 424 Mich. 42, 378 N.W.2d 451 (1985); *People v. Aldridge,* 35 Cal. 3d 473, 674 P.2d 240, 198 Cal.Rptr. 538 (1984); *People v. Thomas,* 660 P.2d 1242 (Colo. 1983); *Watkins v. State,* 288 Md. 497, 420 A.2d 270 (1980) (collecting cases). Instead, courts require proof of some independently suspicious circumstance to corroborate the inference of a guilty conscience associated with flight at the sight of the police. *Aldridge, supra*; *Thomas, supra*; *Watkins, supra.*
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> These courts recognize that allowing flight alone to justify an investigative stop would undercut the very values *Terry* sought to safeguard. *Terry* is based in part upon the proposition that the right to freedom from arbitrary governmental intrusion is as valuable on the street as it is in the home. Thus, while a police officer does not violate the Fourth Amendment by approaching an individual in a public place and asking if the person will answer some questions, neither is the person under any obligation to answer. *Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 76 L.Ed.2d 229 (1983). The person may decline to listen to the questions at all and simply go on his or her way. *Id.* If the option to 'move on' is chosen, the person 'may not be detained even momentarily without reasonable, objective grounds for doing so, and his refusal to listen or answer does not, without more, furnish those grounds.' 460 U.S. at 498, 103 S.Ct. at 1324.
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> In other words, 'A citizen has a much prerogative to avoid the police as he does to avoid any other person, and his efforts to do so, without more, may not justify his detention.' *Smith v. U.S.,* 558 A.2d 312, 316 (D.C. App. 1989). Flight upon approach of a police officer may simply reflect the exercise – 'at top speed' – of the person's constitutional right to 'move on.' *Shabaz,* 424 Mich. at 63, 376 N.W.2d at 460. *Terry* and *Royer* stand for the proposition that exercise of this constitutional right may not itself provide the basis for more intrusive police activity.

State v. Hicks, 488 N.W.2d 359, 363-364 (Neb. 1992).

Wardlow, which was decided after *Hicks,* did not change this basic constitutional protection. Flight is a factor to consider in determining whether reasonable suspicion for a *Terry* stop exists, but it is not *per se* cause to allow the police to chase and then capture a person under circumstances wherein there is no other reason to suspect criminal activity.

In this case, Officer Gonzales' report and his testimony at the preliminary hearing only cite

Mr. Padilla's flight as his basis for stopping him. Officer Gonzales makes no report that Mr. Padilla was in a high crime area, that he was snooping in cars, that pedestrians were unusual in the area, or anything like that. In fact, Officer Gonzales reported that he had been sitting in an alley with his lights off, saw Mr. Padilla, turned on his lights and drove toward Mr. Padilla. Flight seems a perfectly logical response by any pedestrian walking alone at night when a previously darkened car suddenly begins driving toward the walker from an alleyway. While flight might be a factor in determining whether a *Terry* stop is allowed, it is not *per se* reasonable suspicion. Had trial counsel filed a motion to suppress, the district court would have found the stop unconstitutional and granted the motion. Without the unconstitutionally seized evidence, including the cards, the money, and the spark plug parts, the state would have had nothing to link Mr. Padilla to any thefts and the case would have been dismissed.

The district court circumvented the *Terry* problem by stating that the police would have had the right to arrest Mr. Padilla on his warrant and search him incident to that arrest. R 162, 294. However, this analysis is flawed because the police officers did not learn of the warrant until after the unconstitutional search had been completed - not until Mr. Padilla was at the jail being booked.

A judicial determination of the constitutionality of a search focuses on the information an officer possesses at the time of the search. Even if a warrant exists which would allow a valid arrest and search incident to that arrest, if officers do not know about the warrant at the time of the search, the search cannot be upheld based upon the existence of the warrant. *State v. Page,* 140 Idaho 841, 847, 103 P.3d 454, 460 (2004). *See also, State v. Maland, supra* (evidence seized before police discovered outstanding warrant for defendant not admissible - discovery of an arrest

warrant cannot be an intervening circumstance because it occurred after the wrongful seizure of the evidence); *Hernandez v. State,* 132 Idaho 352, 357, 972 P.2d 730, 735 (Ct. App. 1998) (court will not engage in *ex post facto* extrapolations of all crimes that might have been charged at the moment of arrest to retroactively validate an otherwise unlawful arrest).

Trial counsel rendered deficient performance in not filing a motion to suppress. If a motion had been filed, as discussed above, it would have been granted. There could be no strategic reason not to file a motion that would result in the suppression of all the evidence that linked the client to the charged offenses. Thus, the assistance rendered was deficient. *McKay v. State,* 148 Idaho 567, 571, 225 P.3d 700, 704 (2010) (deficient performance established where there is no conceivable tactical justification for trial counsel's failure to act).

And, the deficiency was prejudicial. Without the evidence obtained in the unconstitutional stop and search, the state would have had no evidence whatsoever to link Mr. Padilla to the theft offenses. It is reasonably probable that the case would have simply been dismissed - or if not dismissed that Mr. Padilla would have been acquitted at trial.

Given that Mr. Padilla demonstrated both deficient performance and prejudice, the court should have granted his petition for post-conviction relief. *Strickland, supra.*

V. CONCLUSION

The district court erred in denying Mr. Padilla's petition for post-conviction relief. He asks that this Court reverse the order of dismissal and grant relief.

Respectfully submitted this 13th day of March, 2014.

Deborah Whipple
Attorney for Tarango Padilla

CERTIFICATE OF SERVICE

I CERTIFY that on March 13, 2014, I caused a true and correct copy of the foregoing document to be:

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